IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 124.

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO,

Petitioner,

vs.

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENT, WILSON & CO., INC., IN OPPOSITION TO THE PETITION.

INTRODUCTION.

This supplemental brief is filed in order to invite the attention of the Court to a decision of the National Labor Relations Board rendered subsequent to the filing of this respondent's brief in opposition to the petition for a writ of certiorari.

ARGUMENT.

Petitioner vigorously contends that in its interpretation of Section 8(d) of the Labor Management Relations Act (61 Stat. 142, 29 U. S. C., Supp. V, 158(d), set forth in the Appendix hereto), the decision of the Court below is probably incorrect (Pet. 11), and that the said decision "over-

turns the Board's settled construction of the statute" (Pet. 12).

The National Labor Relations Board on August 8, 1954, filed its decision in *Lion Oil Company and Oil Workers International Union, CIO,* case No. 15-CA-488, reported in 109 NLRB No. 106. This decision involved a comprehensive review and interpretation of the notice provisions of Section 8(d) of said Act.

In the course of its opinion, the Board considered the decision of the Court below and commented as follows:

> "Our decision in this case is not inconsistent, we believe, with the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) in its opinion in the *Wilson* case. *Local No. 3, United Packinghouse Workers of America, CIO* v. *National Labor Relations Board,* 210 F. 2d 325, 331-333. In that case a strike was called more than 60 days after the giving of notices of the kind required by Section 8(d), but before the expiration date of a contract between the Company and the Union. A majority of the Board in the *Wilson* case had concluded that Section 8(d) prohibits a strike to secure modification or termination of a contract only for a period limited to 60 days after the notices required by the Section have been given, and had held that the strike in question did not contravene the Section because the 60-day waiting period had been satisfied. The Court of Appeals believed, however, that the strike contravened Section 8(d) because it occurred before the expiration date of the bargaining contract. Because of the basis on which the Board decided the *Wilson* case, the construction of 8(d) which we adopt here was not presented by the Board to the Court. Leaving aside the effect of the wage reopener, we agree with the view of the Court of Appeals, consistent with the opinions expressed herein, that the 60-day notice period is not the maximum waiting period. Subject to the construction which we have given to Section 8(d) here, we adopt the view that the waiting period extends until the 'expiration date' of the contract."

Thus the Board itself has ruled, contrary to the contention of petitioner, that the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) of the Act in the opinion below is not inconsistent with the Board's present construction of the statute.

CONCLUSION.

It is respectfully submitted that the foregoing constitutes an additional reason for the denial of the petition for a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX.

Section 8(d) of the Labor Management Relations Act (61 Stat. 142, 29 U.S.C., Supp. V, 158(d)) is as follows:

"Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the

dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

Since the filing of our Petition for Certiorari in this case and of the responses thereto, the National Labor Relations Board has handed down a decision in *Lion Oil Company,* 109 NLRB No. 106 (decided August 8, 1954), reiterating its holding in the present case that Section 8(d) of the Act does not prohibit a strike during the life of a collective bargaining agreement when the agreement provides for reopening and does not contain a no-strike clause.

This Memorandum is filed because the Board's new decision rests on a somewhat different construction of the statute than that followed by the Board in the present case.

The Lion Oil Decision

The present (*Wilson*) case and the *Lion Oil* case both present the question whether Section 8(d) of the Act prohibits a strike during the life of a collective bargaining agreement when the agreement provides for reopening, and does not contain a no-strike clause, and when the 60-days' notice is given. In both cases the Board upheld the right to strike; but the ground of decision now advanced by the Board majority in the *Lion Oil* case differs from the prior Board doctrine under which the present case was decided.

The prior doctrine was laid down in *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), an earlier dispute between the parties to the present case. In that case the Board held that Section 8(d) does not forbid a strike during the life of a contract, whether or not the contract has a provision for reopening, so long as the 60-day notice is given and the contract does not contain a no-strike clause. The Board reached this conclusion by holding that the crucial phrase "whichever occurs later" in Section 8(d)(4) is intended to only apply when notice is given *less* than 60 days before the contract's expiration date.

In the present (*Wilson*) case, the Board, after stating that the contract provided for reopening and did not contain a no-strike clause (R. 86), simply cited the *United Packinghouse Workers* case as disposing of the contention that the strike violated Section 8(d) (R. 87).

Factually, the *Lion Oil* case precisely parallels the present (*Wilson*) case: the contract provided for reopening and did not contain a no-strike clause, and the 60-days' notice was given. On these facts the Board held, as in the present case, that the strike was not illegal under Section 8(d).

In the *Lion Oil* case, however, the Board majority reached this conclusion by holding that the term "expiration date" in Section 8(d)(4) encompasses both the termination and the modification date of a contract. This is the Board's language:

> "If Section 8(d) is considered both in the framework of industrial reality and in the perspective of the Congressional purpose to protect the stability of collective bargaining agreements against strikes and lockouts during the life of the contract, it becomes clear that Congress used the term 'expiration date' to signify the date in the course of a labor contract when the contract, by its own terms, is subject to either modification or termination, regardless of whether notice is required explicitly by the agreement. The term 'expiration date' as used in Section 8(d)(4) thus has a twofold meaning; it connotes not only the terminal date of a bargaining contract, but also an agreed date in the course of its existence when the parties can effect changes in its provisions."

This holding disposed of the issue before the Board:

> "It suffices for our decision here that the contract specifically provided for modification and that the earliest date on which modification could be made effective was October 23, 1951. The notice was given precisely 60 days before that date. As the notice was served on August 24, the end of the 60 days statutory period and the date fixed in the contract for making modifications (which, as indicated above, we consider tantamount to 'expiration' as that term is used in Section 8(d)(4)) coincided. Thus, the Union, before striking to enforce its economic demands satisfied the statutory requirements, and consequently the striking employees never lost the protection accorded economic strikers by the Act."

The majority of the Board went on to declare, however, that in its view a strike is not permissible under a contract which does not contain a reopening clause, even though the contract does not contain a no-strike provision. This

dictum that Section 8(d) prohibits a strike during the life of a contract not providing for reopening, even though the 60-days' notice is given and even though the contract does not contain a no-strike clause is, of course, contrary to the construction given the statute by the Board to the *United Packinghouse Workers* case. In the words of Member Peterson, who concurred in the result, the new dictum writes a no-strike clause into every contract unless the contract contains a provision for reopening.

The Board majority in *Lion Oil* went on to express the belief that its new interpretation of Section 8(d) is not inconsistent with the decision of the court below in the present case. It said:

> "Our decision in this case is not inconsistent, we believe, with the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) in its opinion in the *Wilson* case. *Local No. 3, United Packinghouse Workers of America, CIO,* v. *National Labor Relations Board,* 210 F. 2d 325, 331-333. In that case, a strike was called more than 60 days after the giving of notices of the kind required by Section 8(d), but before the expiration date of a contract between the Company and the Union. A majority of the Board in the *Wilson* case had concluded that Section 8(d) prohibits a strike to secure modification or termination of a contract only for a period limited to 60 days after the notices required by the Section have been given, and had held that the strike in question did not contravene the Section because the 60-day waiting period had been satisfied. The Court of Appeals believed, however, that the strike contravened Section 8(d) because it occurred before the expiration date of the bargaining contract. Because of the basis on which the Board decided the *Wilson* case, the construction of 8(d) which we adopt here was not presented by the Board to the Court. Leaving aside the effect of the wage reopener, we agree with the view of the Court of Appeals, consistent with the opinions expressed herein, that the 60-day notice period is not the maximum waiting period. Subject

to the construction which we have given to Section 8(d) here, we adopt the view that the waiting period extends until the 'expiration date' of the contract."

Effect of Lion Oil on the Petition in this Case

We submit that the *Lion Oil* decision does not obviate the need for this Court to review the present case, but rather accentuates it. We urge: (1) *Lion Oil* cannot be reconciled with the decision below. It does not settle the question of statutory construction, but rather further confuses it. (2) As urged in the Petition and conceded in the Government's Memorandum, the question of the proper interpretation of Section 8(d) is important, and its immediate resolution by this Court desirable.

1. The statement of the Board that its decision in *Lion Oil* "is not inconsistent" with the decision below in the present case has scant foundation. On identical facts the court below held the strike illegal in the present case, and the Board held it legal in *Lion Oil*.

The Board's *Lion Oil* opinion seeks to reconcile the two decisions by stating that "the construction of 8(d) which we adopt here was not presented by the Board to the Court" in the *Wilson* (the present) case, and that "Leaving aside the effect of the wage reopener, we agree with the Court of Appeals * * *" that the strike was illegal in *Wilson*.

The Board's statement that its *Lion Oil* construction of 8(d) was not presented "by the Board" to the Court in the present (*Wilson*) case is literally correct. Board Counsel did not argue in the court below that a modification date is equivalent to "expiration date." Rather Board Counsel argued the case on the ground that 8(d) "was designed to cover the situation where the notice was given less than 60 days before the expiration date" (Board Brief, p. 66).

However, the theory now advanced by the Board in *Lion Oil* was explicitly argued in the court below in the present case by counsel for the Petitioner, the Intervenor

below. Indeed Petitioner argued the case solely on the ground that Section 8(d) permits a strike under a contract reopening. Thus, the Petitioner's Brief below on this point commences (p. 6):

"ARGUMENT

I.

"SECTION 8(d) OF THE ACT HAS NOT OUTLAWED STRIKES OVER ISSUES ON WHICH A CONTRACT HAS BEEN VALIDLY REOPENED.

> "There is apparently no dispute in the present proceedings as to the fact that in reopening its contract with the Company in December 1947 the Union fully complied with the requirements of the contract (App. 1047). It is further undisputed that the contract permitted strikes and lockouts in connection with such a reopening (App. 990-991). Finally it is undisputed that all notices required under Section 8(d) of the Act, to the Company (App. 1055-1056) and to the appropriate Federal and state agencies (App. 1009-1013), were given. There was no strike until some twelve weeks after the notice to the Company."

Further, Petitioner explicitly urged that modification under a wage reopener is equivalent to an "expiration date" under Section 8(d). Its brief below argued (p. 10):

> "4. Moreover, the chaotic consequences of the Company's interpretation are not even fully indicated by the nature of the problem posed by the facts of this specific case. It is not uncommon in collective bargaining relations to have not merely certain limited items such as wages on which the parties agree to reopening in advance of the expiration date of the general collective bargaining agreement but also to have certain other limited matters (such as pensions) on which the parties agree to further even greater continuity by covering such matters for a substantially extended period going beyond the 'expiration date' of the general agreement covering conditions of employment. In such a circumstance, which 'expiration

> date' would the Company regard as constituting the effective date of a right to strike under Section 8(d)? In the present case the Company has insisted that the 'expiration date' does not refer to the effective date of the reopening with respect to specific issues (despite the fact that as to such issues the contract by virtue of the notice has been 'terminated') but refers to the expiration date of the entire contract. In a situation where there is an agreement on a long term covering a pension plan, would the Company insist that the right to strike arises only at the 'expiration date' of all agreements? If not, how would the Union ever be able to determine which 'expiration date' the Company would claim to be the governing one? Would the Union then for its own protection be compelled to insist that on all matters, wages, general working conditions, pensions, etc., the entire agreement must expire at one time and after a relatively brief interval, despite full recognition that as a practical matter the varying requirements of varying issues should dictate varying terms and varying periods of reopening and renegotiation?"

This argument, as well as that of Board Counsel, was rejected by the court below, which held that Section 8(d) must be literally construed as forbidding any strike during the life of a contract. The Board's *Lion Oil* holding that a strike pursuant to a contract reopening provision is not forbidden by 8(d) thus conflicts squarely with the decision below in the present case.

It is, of course, true that the Board's *Lion Oil* dictum that 8(d) forbids a strike if the contract does not provide for reopening is consistent with the view of the court below that 8(d) forbids any strike during the life of a contract regardless of whether it provides for reopening. But that is not the question which this case presents, nor, as shown below, is it the significant question of statutory construction which 8(d) presents. The more important issue, and the issue this case presents, is whether strikes pursuant to reopening clauses are legal.

2. That brings us to our second point, that the question of the proper interpretation of Section 8(d) here presented continues to be important and that its prompt resolution by this Court continues to be desirable.

As urged in our Petition, and as acknowledged by the Government in its Memorandum (p. 4), the question whether Section 8(d) prohibits any strike during the life of a collective bargaining agreement, is an issue of "such a nature and importance as to warrant review by this Court."

The *Lion Oil* decision has, we submit, not resolved this issue, but rather added to the confusion. Normally this Court might prefer to await clarification through further litigation in the courts of appeals. But the speedy resolution of the issue by this Court is urgently needed: it affects the right to strike under outstanding collective bargaining agreements covering millions of workers, and the terms of all collective bargaining agreements hereafter to be negotiated.

In the Petition, we assumed that the decision in this case would affect the right to strike under every collective bargaining agreement which either (1) contains a reopening clause or (2) does not contain a no-strike clause. After summarizing the available data on outstanding collective bargaining agreements, the Petition states (p. 10):

> "It therefore appears that some 50 to 55 percent of the collective bargaining contracts permit strikes in some circumstances, such as a deadlock in negotiations on a wage reopening, and that another 10 or 12 percent do not restrict the right to strike during the life of the contract."

If, however, we accept for present purposes the distinction the Board has drawn in *Lion Oil* between contracts providing for reopening and those simply not containing a no-strike clause, it is only those in the former category which are affected by the present decision. The present

case, in other words, affects the right to strike under some 50 to 55 percent of the outstanding collective bargaining contracts, and not 60 to 67 percent as suggested in the Petition.

We respectfully submit, however, that an issue affecting the right to strike under half of the collective bargaining agreements outstanding in this country is sufficiently important to warrant its resolution by this Court. As the Board states in its opinion in the *Lion Oil* case provisions for reopening are "now almost universal in bargaining contracts exceeding one year in duration." The right to strike under all these contracts is placed in doubt by the decision below.

Further, as stated in our Petition (pp. 10-11):

> "* * * new contracts are being negotiated daily, and unions cannot safely ignore the decision below. While it stands, unions will be under strong impulsion to negotiate short term contracts, instead of longer term contracts with a wage reopening and the right to strike. Such a development would * * * make for less stable labor relations."

The millions of workers affected by this issue need to know in advance whether they may or may not legally strike. They need to know that when they make their decision whether to strike, not years afterward. New contracts are being negotiated every day. Unions need to know when they negotiate them whether they may safely sign long term contracts with reopening clauses, or must insist on short term contracts. They cannot know that now.

In the Petition, we also urged that the decision below is probably incorrect because it overturns the Board's settled construction of the statute, which Congress has acquiesced in. This, we believe, continues to be so. The decision below rejects the Board's view, reaffirmed to in the *Lion Oil* case, that Section 8(d) does not forbid strikes under reopening clauses. While the decision below

in the *Wilson* case is consistent with the dictum in *Lion Oil,* that a strike is not permissible in the absence of a reopening clause, that is, as the statistics quoted above show, only the smallest part of the problem. Further, the Congressional acquiescence in the Board's construction, dealt with in our Petition (pp. 13-17) relates only to the right to strike under a reopening clause.

CONCLUSION

For the reasons stated in the Petition and in this Supplemental Memorandum it is respectfully submitted that the petition for a writ of certiorari should be granted.

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